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No. 84-243

In the Supreme Court of the United States

OCTOBER TERM, 1984

MARENGO COUNTY COMMISSION, ET AL., APPELLANTS

v.

UNITED STATES OF AMERICA

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

MOTION TO DISMISS OR AFFIRM

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QUESTIONS PRESENTED

1. Whether the Court has jurisdiction of this appeal under 28 U.S.C. 1254(2).

2. Whether the "results" standard of the 1982 amendment to Section 2 of the Voting Rights Act of 1965 (42 U.S.C. 1973) should be applied to this case.

3. Whether Section 2, as amended, encompasses voting dilution claims.

4. Whether Section 2, as amended, is constitutional.

5. Whether the court of appeals correctly concluded that the record shows that Marengo County's voting system resulted in the dilution of black voting strength at the time of trial.

6. Whether, in the particular circumstances of this case, the court of appeals erred in placing upon appellants the burden of establishing on remand that the County's at-large voting system no longer results in the dilution of black voting strength.

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MOTION TO DISMISS OR AFFIRM

Pursuant to Rule 16.1 of the Rules of this Court, the Solicitor General, on behalf of the United States, moves that the appeal be dismissed or that the judgment of the court of appeals in this case be affirmed.

OPINIONS BELOW

The April 23, 1979 opinion of the district court (J.S. App. A1-A56) is reported at 469 F. Supp. 1150. The August 6, 1980 order of the court of appeals remanding the case to the district court for further proceedings (J.A. App. A61) is unreported. The July 30, 1981 order of the district court on remand (J.S. App. A64-A67) is unreported. The May 14, 1984 opinion of the court of appeals (J.S. App. A69-A120) is reported at 731 F.2d 1546.

JURISDICTION

The judgment of the court of appeals (J.S. App. A121-A122) was entered on May 14, 1984. A notice of appeal (J.S. App. A123-A125) was filed on June 11, 1984, and the appeal was docketed on August 10, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(2). We discuss the Court's jurisdiction at pages 6-8, *infra*.

STATEMENT

1. The United States filed this action in 1978, alleging that the at-large system for electing the County Commission and Board of Education of Marengo County, Alabama, unlawfully "diluted" the voting rights of black residents of the County in violation of 42 U.S.C. 1971, 42 U.S.C. 1973, and the Fourteenth and Fifteenth Amendments. The case was consolidated with a private class action filed by black voters in 1977 (J.S. App. A74 & n.9). Following a trial, the district court entered judgment for appellants on April 23, 1979 (*id.* at A57-A58). In a memorandum opinion accompanying the judgment, the court held that the plaintiffs had failed to meet their burden of establishing that the at-large scheme was created or maintained with a racially discriminatory purpose (*id.* at A1-A56).

The United States appealed.[1] On August 6, 1980, the court of appeals vacated the district court's judgment and remanded the case for further proceedings, "including the presentation of such additional evidence as is appropriate," in light of this Court's intervening decision in *City of Mobile* v. *Bolden*, 446

[1] The private plaintiffs did not pursue an appeal (J.S. App. A65).

U.S. 55 (1980). See J.S. App. A61. In *Bolden*, the Court held that discriminatory intent must be proved to establish a violation of the Constitution and Section 2 of the Voting Rights Act of 1965, 42 U.S.C. 1973. See J.S. App. A61.

2. While this case was pending before the district court on remand, the court of appeals decided *Lodge* v. *Buxton*, 639 F.2d 1358 (5th Cir. 1981), which held that proof of a governing body's unresponsiveness to the needs of minority citizens was essential to prove discriminatory intent under *Bolden*. On July 30, 1981, the district court, relying on *Lodge* v. *Buxton*, again entered judgment for appellants, this time on the ground that the United States had failed to prove unresponsiveness (J.S. App. A62-A67). The district court rejected the United States' offer to present additional evidence, including evidence concerning the reasons for the institution of at-large elections in the County. The court believed that such evidence "would add nothing," because in the absence of proof of unresponsiveness by appellants, the government's suit "must fail" (J.S. App. A67).

The United States again appealed, and the court of appeals held the appeal in abeyance pending this Court's decision on review of the Fifth Circuit's decision in *Lodge* v. *Buxton* (J.S. App. A68). On July 1, 1982, this Court held in *Lodge* that proof of unresponsiveness is not essential to establish intentional discrimination in the context of a voting dilution claim. *Rodgers* v. *Lodge*, 458 U.S. 613, 625 n.9 (1982).

3. The court of appeals subsequently rendered its decision in the instant case on May 14, 1984 (J.S. App. A69-A122). The court of appeals concluded that the case should be decided by application of the

intervening 1982 amendment to Section 2 of the Voting Rights Act (Pub. L. No. 97-205, 96 Stat. 131 (to be codified at 42 U.S.C. 1973), which prohibits not only any electoral system adopted or maintained with discriminatory purpose, but also any such system which "results in a denial or abridgement of the right * * * to vote on account of race or color * * *".[2] The court held that the 1982 amendment applies to pending cases (J.S. App. A76-A80); that it encompasses claims of voting dilution (*id.* at A80-A83); and that it is constitutional (*id.* at A83-A96).

The court of appeals further concluded that "[t]he record compels a finding that, as of the time of trial, Marengo County's at-large system resulted in an abridgement of black citizens' opportunity to participate in the political process and to elect representatives of their choice [in] violation of the results test adopted by Congress in section 2 of the Voting Rights Act" (J.S. App. A119). The court summarized the evidence supporting its conclusion (*ibid.*):

> The evidence reveals racially polarized voting; a nearly complete absence of black elected officials; a history of pervasive racial discrimination that has left Marengo County blacks economically, educationally, socially, and politically disadvantaged; polling practices that have impaired the ability of blacks to register and participate actively in the electoral process; election features that enhance the opportunity for dilution; and considerable unresponsiveness on the part of some public bodies.

The court of appeals nevertheless declined the United States' request that the court render judg-

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[2] Section 2, as amended, is reproduced at J.S. 5.

ment in the government's favor and remand only for the devising of a remedy (*id.* at A96, A119). Instead, the court remanded the case for further proceedings on the merits, "to allow the parties to update [and] supplement the record with evidence that might tend to affect [the] finding of discriminatory results" (*id.* at A120). The court of appeals explained that it was taking this approach because conditions might have changed in Marengo County during the five years since the case had been tried (*id.* at A119). However, in the particular circumstances of this case, because the evidence adduced at the time of trial established a "clear violation" of the "results" test in the amended Section 2 of the Voting Rights Act, the court of appeals placed on appellants the burden of establishing on remand "that circumstances have changed sufficiently to make [its] finding of discriminatory results in 1978 inapplicable in 1984" (*id.* at A119-A120).

ARGUMENT

The appeal should be dismissed for lack of jurisdiction under 28 U.S.C. 1254(2), because the court of appeals did not definitively resolve the validity of the at-large electoral system under Section 2 of the Voting Rights Act. The court of appeals instead remanded for further proceedings on that question, including the receipt of additional evidence. Treating the jurisdictional statement as a petition for a writ of certiorari (see 28 U.S.C. 2103), the petition should be denied because the case is in an interlocutory posture and because the court of appeals' disposition of the issues presented was clearly correct and does not conflict with the decisions of this Court or of any other court of appeals. If the Court concludes that it has appellate jurisdiction under 28

U.S.C. 1254(2), the judgment of the court of appeals should be affirmed.

1. This case is not within the Court's appellate jurisdiction. Under 28 U.S.C. 1254(2), this Court has jurisdiction to entertain an appeal from a decision by a court of appeals holding a state statute invalid as repugnant to the Constitution, treaties, or laws of the United States. Appellants contend (J.S. 6, 14-15 & n.27) that the court of appeals has held that the state statutes providing for the at-large election of the members of the County Commission and Board of Education [3] are invalid under Section 2 of the Voting Rights Act and that this case therefore falls within the scope of 28 U.S.C. 1254(2). This contention is incorrect.

In *Slaker* v. *O'Connor*, 278 U.S. 188, 189 (1929), the Court held that, under the predecessor to Section 1254(2), "appeals to this Court from circuit courts of appeal lie only from final judgments or decrees * * *." *Slaker* was followed without comment in *South Carolina Electric & Gas Co.* v. *Flemming*, 351 U.S. 901 (1956) (per curiam). Although the precedential force of these decisions has been questioned, they have not been overruled. See *New Orleans* v. *Dukes*, 427 U.S. 297, 301-302 (1976); *Doran* v. *Salem Inn, Inc.*, 422 U.S. 922, 927 (1975); *El Paso* v. *Simmons*, 379 U.S. 497, 502 (1965); *Chicago* v. *Atchison T. & S.F. Ry.*, 357 U.S. 77, 82-83 (1958). In any event, there is no occasion here to resolve the controversial aspect of *Slaker*. The Court has questioned the application of the finality rule of *Slaker* where a court of appeals definitively re-

[3] The governing statutory provisions, Acts Nos. 17 and 184 of the 1955 Alabama Legislature and Acts Nos. 44 and 45 of the 1966 Legislature, are reproduced at J.S. App. A127-A132.

solved the question of the validity of a state statute and all that remained on remand was further proceedings on matters of state law (see *New Orleans* v. *Dukes*, 427 U.S. at 302; *El Paso* v. *Simmons*, 379 U.S. at 501-502) or the formal entry of judgment (*Chicago* v. *Atchison, T. & S.F. Ry.*, 357 U.S. at 82-83). Compare *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469, 476-486 (1975). But the Court has indicated that even if the finality rule were to be relaxed in those instances, an appeal to this Court still would not lie under 28 U.S.C. 1254(2) where the court of appeals considered the validity of a state statute only in connection with a ruling on the propriety of preliminary relief and thus did not definitively resolve the question. *Doran* v. *Salem Inn, Inc.*, 422 U.S. at 927.

It follows a fortiori that an appeal does not lie under 28 U.S.C. 1254(2) in this case. The court of appeals did not invalidate the state statutes referred to by appellants. To be sure, the court held that "as of the time of trial, Marengo County's at-large system resulted in an abridgement of black citizens' opportunity to participate in the political process and to elect representatives of their choice" (J.S. App. A119). However, the court of appeals rejected the United States' request that it render judgment invalidating the county's at-large system and remand only for the purpose of devising a remedy (*ibid.*). The court instead afforded appellants an opportunity to demonstrate on remand that the at-large system no longer adversely affects minority voters in Marengo County and thus is not invalid under federal law (*id.* at A120, A122). Compare *Minnick* v. *California Department of Corrections*, 452 U.S. 105, 120-127

(1981).[4] The court of appeals' judgment therefore is clearly not definitive even with regard to the validity of the at-large election system and any state statutes providing for such a system, much less with regard to *all* issues in the case, including the nature of an appropriate remedy. For this reason, the appeal should be dismissed for want of jurisdiction under 28 U.S.C. 1254(2).

2. Treating the appeal as a petition for a writ of certiorari (see 28 U.S.C. 2103), the petition should be denied. In view of the interlocutory nature of the court of appeals' decision, none of the issues raised by appellants is ripe for review. If appellants prevail on remand, there will be no need for them to seek review in this Court on any of the questions they now present. On the other hand, if they are unsuccessful on remand, they may raise whatever issues they deem appropriate, including the ones they now present, in an appeal to the court of appeals from the district court's final judgment, and they may thereafter seek further review in this Court. See

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[4] In *Minnick*, the Court held that the decision of the state court of appeals was not final for purposes of the Court's certiorari jurisdiction under 28 U.S.C. 1257(3) because the state court had remanded for further proceedings on the federal issue. In *New Orleans* v. *Dukes*, 427 U.S. at 302, the Court cited *Cox Broadcasting Corp.* v. *Cohn*, *supra* — which involved the finality requirement of 28 U.S.C. 1257 — in support of its conclusion that the judgment of the court of appeals was final for purposes of 28 U.S.C. 1254(2), thereby indicating that 28 U.S.C. 1254(2) and 28 U.S.C. 1257(3) should be read in a like fashion. See R. Stern & E. Gressman, *Supreme Court Practice and Procedure* 67 (5th ed. 1978). The Court's dismissal of the writ in certiorari in *Minnick* therefore strongly supports dismissal of the appeal in this case.

Toledo Scale Co. v. *Computing Scale Co.*, 261 U.S. 399, 418 (1923). At that time, the Court would have the benefit of an updated record directed specifically to the current validity of the County's at-large system.

3. If the Court concludes that it does have jurisdiction of the appeal, it should summarily affirm the judgment below. The court of appeals' decision is consistent with the decisions of this Court and other courts of appeals, and appellants present no question warranting plenary review by this Court.

a. The court of appeals correctly held (J.S. App. A76-A80) that the "results" test of amended Section 2 should be applied to this case. Under this Court's decisions, when Congress has amended the governing law while a case is pending on appeal, the court of appeals ordinarily should apply the new law to the case unless Congress has indicated that it does not intend that law to apply to pending cases or manifest injustice would result from doing so. *Bradley* v. *Richmond School Bd.*, 416 U.S. 696, 711-721 (1974).

The 1982 amendment to Section 2 of the Voting Rights Act became effective upon its enactment on June 29, 1982 (Pub. L. 97-205, § 6, 96 Stat. 135), well before this case was decided. The legislative history establishes that Congress intended the courts to apply amended Section 2 to cases pending on the date of its enactment. Representative Sensenbrenner, for example, explained that "Section 2 * * * will take effect immediately, and will, of course, apply to pending cases in accordance with the well established principles of *Bradley* v. *City of Richmond*, 416 U.S. 686 (1974), and *United States* v. *Alabama*, 362 U.S. 602 (1980)." 128 Cong. Rec. H3841 (daily ed. June

23, 1982).[5] See also *id.* at S7095 (daily ed. June 18, 1982) (remarks of Sen. Kennedy). Moreover, this Court has already indicated that the 1982 amendment to Section 2 should be applied to cases pending on appeal: in *Escambia County* v. *McMillan*, No. 82-1295 (Mar. 27, 1984), the Court vacated the decision of the Fifth Circuit and remanded for reconsideration in light of the 1982 amendment.

It also is clear that no injustice has resulted from the court of appeals' application of the amended Section 2 to this case. When this case was tried, the evidence was addressed to the so-called "*Zimmer* factors," drawn from the court of appeals' opinion in *Zimmer* v. *McKeithen*, 485 F.2d 1297 (5th Cir. 1973) (en banc), aff'd on other grounds *sub nom. East Carroll Parish School Board* v. *Marshall*, 424 U.S. 636 (1976) (per curiam). The district court also relied on those factors in determining that appellants' at-large electoral scheme did not unconstitutionally dilute minority voting strength (J.S. App. A9). The standards applied in assessing dilution claims under the amended Section 2 of the Voting Rights Act are patterned after the *Zimmer* standards. Compare S. Rep. 97-417, 97th Cong., 2d Sess. 28-29 (1982), with *Zimmer* v. *McKeithen*, 485 F.2d at 1305. Furthermore, the court of appeals remanded the case to afford appellants an opportunity to present additional evidence on whether the at-large voting scheme currently has discriminatory results (J.S. App. A120).

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[5] In *United States* v. *Alabama*, which also was a voting rights case, the Court gave effect to a statutory amendment that was enacted while the case was pending before this Court after certiorari was granted. 362 U.S. at 604.

Thus appellants have not been prejudiced by the court's application of the amended Section 2.[6]

b. Nor did the court err in ruling that the amended Section 2 encompasses voting dilution claims (J.S. App. A80-A81). The amended Section 2 was "[s]pecifically designed to reach claims of voting dilution." *Major* v. *Treen*, 574 F. Supp. 325, 341 (E.D. La. 1983) (three-judge court). The 1982 amendment was a direct congressional response to this Court's decision in *City of Mobile* v. *Bolden*, *supra*, a dilution case (see, *e.g.*, S. Rep. 417, *supra*, at 15-17), and the Senate Report explicitly states that the amended Section 2 "without question is aimed at discrimination which takes the form of dilution" (*id.*

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[6] The lower courts routinely have applied the amended Section 2 to cases pending on the date of its enactment. See, *e.g.*, *Jones* v. *City of Lubbock*, 727 F.2d 364 (5th Cir. 1984); *United States* v. *Dallas County Comm'n*, 739 F.2d 1529, 1534 (11th Cir. 1984); *Rybicki* v. *Illinois Bd. of Elections*, 574 F. Supp. 1147 (N.D. Ill. 1983) (three-judge court); *Major* v. *Treen*, 574 F. Supp. 325 (E.D. La. 1983) (three-judge court); *Gingles* v. *Edmisten*, No. 81-803-CIV-5 (E.D. N.C. Jan. 27, 1984) (three-judge court), appeal pending, No. 83-1968; *Terrazas* v. *Clements*, 581 F. Supp. 1329 (N.D. Tex. 1984) (three-judge court). The only exception of which we are aware is *McMillan* v. *Escambia County*, 688 F.2d 960 (5th Cir. 1982). However, the court of appeals in that case did not suggest that the amendment should not ordinarily be applied to pending cases. To the contrary, it acknowledged the legislative history we have quoted in the text indicating that the amendment *should* apply to pending cases. The court simply deferred resolution of the Voting Rights Act issue until a later date and disposed of the case by finding a Fourteenth Amendment violation. 688 F.2d at 962 n.2. This Court later vacated the court of appeals' decision and remanded for consideration of plaintiffs' dilution claim under amended Section 2. *Escambia County* v. *McMillan*, No. 82-1295 (Mar. 27, 1984).

at 30 n.12). As the court of appeals correctly observed, the legislative history "is replete with discussion of *how* the amendment will apply to vote dilution cases, [but t]here is not a word to suggest any doubt about *whether* it would apply to such cases" (J.S. App. A82 (second emphasis supplied by the court)). The court of appeals' ruling in this regard is consistent with the decisions of other federal courts, which uniformly have applied the amended Section 2 to voting dilution claims.[7]

c. The court of appeals also correctly held that the amended Section 2 is constitutional. In a comprehensive analysis upon which we rely (J.S. App. A83-A96), the court ruled that the amended Section 2 is an appropriate exercise of Congress's powers to enforce both the Fourteenth and Fifteenth Amendments.[8]

In *City of Mobile* v. *Bolden, supra*, this Court held that the Fourteenth and Fifteenth Amendments prohibit only purposeful discrimination in voting. Under this Court's decisions, however, it is beyond question that in enforcing those amendments, Congress may prohibit voting practices that are not intentionally

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[7] See, *e.g.*, *Jones* v. *City of Lubbock, supra*; *Buchanan* v. *City of Jackson*, 708 F.2d 1066, 1072 (6th Cir. 1983); *Ketchum* v. *Byrne*, No. 83-2044 (7th Cir. Aug. 14, 1984), slip op. 10; *Buskey* v. *Oliver*, 565 F. Supp. 1473, 1482 & n.21 (M.D. Ala. 1983); *Chapman* v. *Nicholson*, 579 F. Supp. 1504, 1508 (N.D. Ala. 1984); *Rybicki* v. *Illinois Bd. of Elections*, 574 F. Supp. at 1148; *Major* v. *Treen, supra*; *Gingles* v. *Edmisten*, slip op. 11; *Terrazas* v. *Clements, supra*.

[8] The court of appeals' decision upholding the constitutionality of the amended Section 2 is consistent with the decisions of other federal courts. See, *e.g.*, *Jones* v. *City of Lubbock*, 727 F.2d at 372-375; *Major* v. *Treen*, 574 F. Supp. at 342-349.

discriminatory, as long as the legislation is designed to carry out the basic objectives of the amendments. See, *e.g.*, *City of Rome* v. *United States*, 446 U.S. 156 (1980), and *South Carolina* v. *Katzenbach*, 383 U.S. 301 (1966) (upholding Section 5 of the Voting Rights Act, which requires preclearance of all changes in voting practices in covered jurisdictions to determine whether they are discriminatory in purpose or effect); *Oregon* v. *Mitchell*, 400 U.S. 112 (1970) (upholding a five-year nation-wide ban on the use of literacy tests); and *Katzenbach* v. *Morgan*, 384 U.S. 641 (1966) (upholding a prohibition on a state's use of a literacy test when applied to Spanish-speaking citizens educated in American flag schools). As the Court stated in *City of Rome* v. *United States*, 446 U.S. at 173, "the prior decisions of this Court foreclose any argument that Congress may not * * * outlaw voting practices that are discriminatory in effect." See also *Fullilove* v. *Klutznick*, 448 U.S. 448 (1980).

The 1982 amendment to Section 2 is plainly designed to carry out the objectives of the Fourteenth and Fifteenth Amendments. In amending Section 2, Congress specifically concluded "that to enforce fully the Fourteenth and Fifteenth Amendments, it is necessary that Section 2 ban election procedures and practices that result in a denial or abridgement of the right to vote." S. Rep. No. 417, *supra*, at 40. In reaching this conclusion, Congress found "(1) that the difficulties faced by plaintiffs forced to prove discriminatory intent by case-by-case adjudication create a substantial risk that intentional discrimination barred by the Fourteenth and Fifteenth Amendments will go undetected, uncorrected and undeterred unless the results test proposed for section 2 is

adopted; and (2) that voting practices that have discriminatory results perpetuate the effects of past purposeful discrimination" (*ibid.* (footnote omitted)). Under this Court's decisions, then, there can be no doubt that the amended Section 2 is an appropriate exercise of Congress's authority to enforce the Fourteenth and Fifteenth Amendments.[9]

d. The court of appeals correctly concluded on the basis of its review of the record that, at the time of trial, the County's at-large election system resulted in an abridgement of black citizens' opportunity to participate in the political process, in violation of the amended Section 2 of the Voting Rights Act (J.S. App. A96-A119). The district court had concluded that the ultimate inquiry was whether intentional discrimination was shown, and its assessment of the "*Zimmer* factors" was directed to that ultimate question (see J.S. App. A51, A52, A55-A56). The amended Section 2 of the Voting Rights Act, however, does not require a finding of intentional discrimination; it focuses instead on whether the voting practice in question results in an abridgement of the rights of black citizens. The court of appeals there-

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[9] Nor can it be said that in amending Section 2, Congress has wrongfully usurped this Court's powers by attempting to overrule the decision in *City of Mobile* v. *Bolden*. *Bolden* held that proof of intentional discrimination was necessary to establish a violation of the Fourteenth or Fifteenth Amendment. But, as the court of appeals correctly recognized, "nothing in *Mobile* v. *Bolden* suggested that Congress could not prohibit by statute what the Court had declined to forbid under the Constitution" (J.S. App. A94 (footnote omitted)). Indeed, on the same day *Bolden* was decided, this Court in *City of Rome* reaffirmed the validity of the statutory preclearance requirement, including its attendant "effects" test. 446 U.S. at 173-178.

fore properly reviewed the district court's findings and conclusions under the new statutory standard and the "totality of circumstances approach" required by Section 2, taking into account the various relevant factors. See Pub. L. No. 97-205, § 3(b), 96 Stat. 134 (to be codified at 42 U.S.C. 1973(b)).

The court of appeals first recognized that the legislative history of the 1982 amendment to Section 2 establishes that the existence of racially polarized voting ordinarily is the keystone of a voting dilution case (J.S. App. A103-A104). The court noted in this regard that "[t]he district court found extremely strong evidence of polarized voting in elections before 1978, and continuing, though somewhat reduced, polarization in the 1978 elections" (*id.* at A105 (footnote omitted)); see *id.* at A11-A16. It concluded that "[r]ace is, as it has been since blacks were allowed to vote, the main issue in Marengo County politics" (*id.* at A105 (footnote omitted)). Again like the district court (see *id.* at A54-A55), the court of appeals also found an historical record of discrimination in Marengo County and lingering effects of that discrimination continuing to the time of trial (*id.* at A105-A109). On this point, the court of appeals noted the extensive litigation required to overcome the resistance to desegregation of the County's schools, to end discrimination in selection of grand and petit juries, and to enforce the rights of blacks to vote and run as candidates. The court further noted that because blacks are poorer and less educated, they have less political influence and register and vote in significantly lower numbers than whites (J.S. App. A107), and it found the district court's decision in these circumstances—which attributed lower black participation to "apathy" or "a failure of blacks to turn out their votes"—to be unsupported by

the record and based on speculation (*id.* at A107-A109). Similarly, the court of appeals relied on the district court's findings (see *id.* at A22-A23, A55) that two election practices in the County had exacerbated the deficiencies in black participation: the low number of black poll officials and the failure of the Board of Registrars to follow state law that required it to visit rural areas of the County, where more blacks than whites resided (J.S. App. A110-A112).

The court of appeals also assessed other factors under the totality of circumstances approach required by the amended Section 2. It noted, for example, that there is a majority vote requirement in the Democratic Primary Election (J.S. App. A112), which the district court found was "for all intents and purposes *the election* in Alabama" (*id.* at A44 (emphasis supplied by the district court)). The district court found this majority vote requirement to be a factor that enhanced a finding of dilution (*ibid.*) because of the history of white candidates' winning of runoff elections (*id.* at A11-A15). The court also noted that as of 1978, no black had ever been elected to the Board of Education or County Commission and that only one black was elected to a County office, that of County Coroner (*id.* at A114-A115).

In addition, the court of appeals relied upon the district court's finding that there was no strong state policy either for or against at-large elections (*id.* at A114-A115; see *id.* at A38-A39), noting that the at-large system was adopted in 1955, one year after this Court's decision in *Brown* v. *Board of Education*, 347 U.S. 483 (1954), a fact that supported an inference that it was a "direct response to the prospect of increased black political participation" (J.S. App. A114). Finally, the court found a lack of responsiveness by the Board of Education and Board of Regis-

trars to minority needs (J.S. App. A115-A118). The court of appeals rejected the district court's effort to discount the importance of the Board of Education's performance, concluding that although it "may finally be providing equal education it has done so only after three decades of resistance, and only because the courts ordered it to do so" (*id.* at A117).

In sum, the conclusion reached by the court of appeals, after a thorough assessment of the record and findings and conclusions of the district court in light of the 1982 amendment to Section 2 of the Voting Rights Act, was amply supported and clearly correct. As explained above, the court of appeals relied in large measure on factual findings made by the district court, and where it differed with the district court, it did so principally with regard to the conclusions to be drawn from those facts in light of the new legal standards in Section 2. The court of appeals' resolution of these issues in this particular factual context does not warrant plenary review.

e. The court of appeals also did not err in the circumstances of this case in placing upon appellants the burden of establishing on remand that the at-large system no longer operates to dilute minority voting strength. The court found that the evidence adduced by the government at trial established that the at-large system resulted in an abridgement of the right of black citizens to participate in the political process and to elect representatives of their choice. On the basis of that finding, the court could have rendered judgment for the government and remanded the case for entry of relief. But because five years had elapsed since the time of trial, the court elected to remand the case to allow the parties to update and supplement the record with evidence that might affect the finding of discriminatory results. Because, in the

court of appeals' view, the evidence at trial was sufficient at the very least to establish a prima facie case of a violation of Section 2, it was within the court's discretion to place upon appellants the burden of proving that changed circumstances nevertheless warrant entry of judgment in their favor.

CONCLUSION

The appeal should be dismissed. Treating the papers whereon the appeal is taken as a petition for a writ of certiorari, the petition should be denied. In the alternative, the judgment of the court of appeals should be affirmed.

Respectfully submitted.

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